

B.H., Appellant

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Philadelphia, PA, Employer**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

JURISDICTION

On May 27, 2020 appellant filed a timely appeal from January 29 and April 23, 2020 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated November 1, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly denied appellant's November 1, 2019 request for reconsideration pursuant to 5 U.S.C. § 8128(a); and (2) whether OWCP properly denied

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

appellant's March 25, 2020 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 29, 1999 appellant, then a 40-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 1999 she sustained an injury when a box struck her on the right side of her face.³ OWCP accepted the claim for right contusion of orbital tissues, which was subsequently expanded to include right eye uveitis.⁴

On February 17, 2014 appellant obtained the services of Aaron B. Aumiller, Esq., and Jason Lomax, Esq., to represent her before OWCP.

By letter dated March 16, 2015, OWCP acknowledged its receipt of appellant's statement designating Mr. Aumiller as her then-counsel and included an explanation of its procedures pertaining to representative's fee petitions. It advised that, in each case where a representative's fee is desired, a petition for approval of the fee must be submitted to OWCP. The petition must contain an itemized statement acknowledging that the claimant is aware that he or she must pay the fee and that OWCP is not responsible for paying (or reimbursing) the fee or other costs associated with the representative's services.

On June 27, 2017 then-counsel submitted a fee petition in the amount of \$9,462.70 for 22.13 discounted hours of billed services rendered from February 17, 2014 through March 22, 2016.⁵ An itemized statement listing the services and time spent on each date was provided. Then-counsel advised that they were unable to obtain appellant's approval of the requested attorney fee.

On June 27, 2017 OWCP approved the fee petition, noting that it had been accompanied by a signed statement from appellant approving the fee.

In a letter dated July 11, 2017, then-counsel informed OWCP that they did not submit a signed fee approval from appellant. They requested OWCP issue a decision correcting that error. Then-counsel further noted that the prior fee petition was sent in error. They requested that OWCP review and approve their total fee in the amount of \$22,819.50 for 46.10 hours. An itemized statement listing the services and time spent on each date was provided.

³ Appellant was removed from employment with the employing establishment, effective August 2, 2001.

⁴ By decision dated July 5, 2007, OWCP denied appellant's claim for disability for the period January 2, 1999 through August 2, 2001, which was affirmed by an OWCP hearing representative in a decision dated March 6, 2008. It denied her claim for a schedule award in a decision dated March 6, 2014. By decision dated July 30, 2015, OWCP vacated the denial of appellant's claim for a schedule award. On November 6, 2015 it granted her a schedule award for 100 percent permanent impairment of the right eye.

⁵ Counsel noted "By agreement, I have limited my fee to no more than twenty percent (20%) of her recovery of compensation."

In a September 26, 2017 letter, OWCP forwarded appellant a copy of then-counsel's revised fee petition. It afforded her 30 days to comment and denote whether the fee charged was reasonable and appropriate.

In a letter dated October 11, 2017, appellant disagreed with counsel's requested fee of \$22,891.50. She stated that she did not sign the form approving a fee in the amount of \$9,462.70 as they were not entitled to receive 20 percent of her schedule award. Appellant asserted that they were only entitled to five percent of the award, which had been paid in full.

In a letter dated August 31, 2018, then-counsel disagreed with appellant's assertions that she had either paid in full or overpaid for the provided legal services. They noted that the fee agreement provided for a fee cap of 20 percent of a schedule award, but noted that the fee agreement did not apply if their services were terminated. Then-counsel acknowledged receipt of \$3,177.10 from appellant, which remained in a representative trust account, and that a check in the amount of \$6,285.60 had been returned to her uncashed due to her hostility. They disagreed with her assertion that counsel's fee was limited to five percent of her schedule award by law. Then-counsel again requested a fee in the amount of \$22,819.50. Attached to the August 31, 2018 letter was a copy of the client agreement signed by appellant on February 17, 2014. Regarding the fee for legal services, the agreement provided a rate of \$495.00 per hour. Appellant would be billed accordingly, but payment was not required unless a benefit was obtained on her behalf. At that time, the fee would become due and would be capped at 20 percent of the benefit recovered. In cases where there were opportunities for multiple benefits, the 20 percent fee cap would apply each time there is a benefit recovery. Then-counsel further noted that they reserved the right to collect the total fee in full if appellant terminated their services.⁶

In an October 17, 2018 letter, OWCP afforded her 30 days to comment and to denote whether the fees charged were reasonable and appropriate.

In an October 22, 2018 letter, appellant asserted that then-counsel was owed nothing as they had been paid the amount owed for the legal services provided. In support of her assertion, she submitted a copy of an April 8, 2016 letter from them informing her that the total paid to date was \$9,462.70 and that the firm was not asking for any additional funds. Then-counsel attached an itemized statement of time and services provided and requested that she sign, date, and return the attached fee approval form. The letter emphasized that appellant was not being asked to pay anything more than what she had already paid; they were merely requesting she return the attached fee approval form.

By decision dated November 1, 2018, OWCP approved counsel's fee petition in the amount of \$22,819.50 for services rendered from February 17, 2014 through March 22, 2016.⁷ It found that appellant had not contested the reasonableness of the amount of the fee.

⁶ The Board notes that OWCP's regulations provide that "[c]ontingency fees are not allowed in any form." 20 C.F.R. § 10.702(a). *See also, E.J.*, Docket No. 19-1909 (issued August 19, 2020).

⁷ The decision noted the period as February 17, 2014 through July 11, 2017; however, this appears to be a typographical error as the July 11, 2017 fee petition notes that the legal services were rendered from February 17, 2014 through March 22, 2016.

On November 1, 2019 appellant requested reconsideration of the November 1, 2018 attorney fee decision. She resubmitted correspondence received from prior-counsel asserting that this established that she had paid counsel in full for the legal services provided.

By decision dated January 29, 2020, OWCP denied appellant's November 1, 2019 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On March 25, 2020 appellant again requested reconsideration of the November 1, 2018 attorney fee decision. She again asserted that she had paid then-counsel what was owed in full, *i.e.*, "20 percent out of each schedule award check" she received. Appellant noted the amount she paid and asserted that she never terminated then-counsel's services or became hostile with them.

By decision dated April 23, 2020, OWCP denied appellant's March 25, 2020 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁰

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹¹ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹²

OWCP's procedures provide that each request for reconsideration must be handled by a senior claims examiner who was not involved in the making of the contested decision. All

⁸ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

¹⁰ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b (February 2016).

¹¹ *Id.* at § 10.606(b)(3).

¹² *Id.* at § 10.608(a), (b).

reconsideration decisions, whether affirmative or negative, must be issued by a senior claims examiner or higher authority.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant disagreed with the November 1, 2018 decision and timely requested reconsideration on November 1, 2019. The underlying issue on reconsideration is the approval of attorney fees in the amount of \$22,819.50 for services rendered from February 17, 2014 through March 22, 2016. Appellant asserted that then-counsel had been paid in full for the legal services rendered. The Board finds that her argument is relevant to the underlying issue of the approval of a representative's fee petition. Appellant asserted that then-counsel had been paid in full the amount owed for their legal services. While this argument is not new, OWCP did not previously address this assertion. As appellant has advanced a relevant legal argument which was not previously considered by OWCP, such argument warrants further merit review.¹⁴

As appellant has raised a relevant legal argument not previously considered by OWCP, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.¹⁵ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision regarding counsel's fee petition.¹⁶

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).¹⁷

¹³ *Supra* note 10 at Chapter 2.1602.2(b) (October 2011).

¹⁴ *See M.R.*, Docket No. 19-1449 (issued March 11, 2020); *D.K.*, Docket No. 19-0637 (issued December 11, 2019); *D.M.*, Docket No. 16-1754 (issued January 10, 2018).

¹⁵ *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

¹⁶ *Supra* note 6.

¹⁷ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 23 and January 29, 2020 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 5, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board